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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

No. 373

THE GREAT LAKES TOWING COMPANY,
*Petitioner,*

*vs.*

AMERICAN STEAMSHIP COMPANY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

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*vs.*

AMERICAN STEAMSHIP COMPANY,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable, The Justices of the Supreme Court of the United States:*

Petitioner, The Great Lakes Towing Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 22, 1964, vacating the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, entered on June 18, 1963, which had adjudged petitioner solely negligent and liable to respondent for damages arising out of a collision between the stern of respondent's Steamship Detroit Edison and a spile cluster along the face of the Inland

# 4 dock at Indiana Harbor, Indiana on May 23, 1961 while the steamer was being assisted by petitioner's Tug Montana on a bow towline, but limiting respondent's recovery to $1,837.50 plus costs in accordance with certain general terms and conditions contained in petitioner's 1959 tariff pursuant to which the movement of the steamship with the tug's assistance was undertaken.

## OPINIONS BELOW.

The opinion for the United States District Court for the Northern District of Indiana, Hammond Division, including findings of fact, conclusions of law, memorandum decision, order amending findings no. 8 and no. 9 and amendment to memorandum, is not reported, but it is set forth in full in the joint appendix included in the record herein at pp. 382-399, 415-416. The opinion of the United States Court of Appeals for the Seventh Circuit is unreported at printing but is set forth in full in the appendix to this petition at pp. 27-33. The judgment of the United States Court of Appeals for the Seventh Circuit is set forth in full in the appendix to this petition at p. 34.

## JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered on May 22, 1964. A petition for rehearing was filed on June 6, 1964. An order denying the petition for rehearing was made and entered by the United States Court of Appeals for the Seventh Circuit on June 17, 1964 and is set forth in full in the appendix to this petition at p. 35. The jurisdiction of this Honorable Court is invoked pursuant to 28 U. S. C., Sec. 1254 (1).

## QUESTIONS PRESENTED FOR REVIEW.

1. Is a provision in a towage contract, which states that when a self-propelled vessel under power is being towed or pushed stern first or winded (turned) by only one tug at her bow or stern the liability of the tug owner for damages arising out of the service shall not exceed $1,000.00, with provision for increase in the limit of liability upon advance written notice and payment of increased rates in the amount of 5% of the base rate for every $1,000.00 increase in the limit of liability, valid between the parties to the contract?

2. Is a provision in a towage contract, which states that no claim for delay of the vessel served for which the tug owner may be liable shall exceed $100.00 per day of delay, with provision for increasing the demurrage liability limitation upon advance written notice and payment of increased rates in the amount of 5% of the base rate for every $100.00 per day increase in the limit of liability, valid between the parties to the contract?

3. Was respondent's Steamer Detroit Edison, whose stern collided with a spile cluster along the face of the Inland # 4 dock on the outer basin at Indiana Harbor, Indiana, while she was being assisted stern first to the dock alone by petitioner's Tug Montana on a bow towline, negligent for failing to fulfill her duty of keeping a stern lookout for both vessels, for failing to convey to the tug the exact information noted by the steamer's stern lookout to the steamer's pilot house as to her course, speed and position with reference to the # 4 dock, for failing to warn the tug at her bow of danger at her stern, for failing to maintain a bow lookout and for operating her engines and rudder, without warning to the tug, in such a manner as to directly cause or contribute to the cause of the subsequent collision?

## STATEMENT OF THE CASE.

Petitioner, The Great Lakes Towing Company, is and was on May 23, 1961 the sole owner and operator of the harbor Tug Montana which has an overall length of 84.3 ft., a beam (breadth) of 21.3 ft., is powered by a 1,400 h.p. diesel electric engine and is equipped with an F.M. radio-telephone in her pilot house. Respondent, American Steamship Company, is and was on May 23, 1961 the sole owner and operator of the Steamship Detroit Edison which is a self-unloader type steam vessel having an overall length of 604 ft., a beam (breadth) of 72 ft. and which is powered by a 7,000 h.p. steam turbine engine. The steamer's pilot house is located high on her bow, 26 ft. aft of her stem, and is equipped with both A.M. and F.M. radio-telephones. Communication between the steamer's pilot house and her fantail astern is by public address system and telephone. Communication between her pilot house and the forecastle deck forward is verbal.

Petitioner's tariff dated April 15, 1959 was published at that time and a copy of it was mailed to respondent at or about that time. Another copy of that tariff was mailed to and was received by respondent on or about April 20, 1960. The tariff included, *inter alia*, the following provisions;

> "11. The rates for service named herein are made upon the express condition that no claim for delay of any vessel served (whether due to repairs of damage or other cause), for which the Towing Company may be legally liable, shall in any case exceed One Hundred Dollars ($100.00) per calendar day of such delay. Upon written notice from the owner, charterer, or person having control of the vessel or vessels to be served to the Towing Company before the service is commenced, the above mentioned limit of liability upon demurrage claims may be increased, in which event the regular tariff rates will be increased five per cent of such rates

for every One Hundred Dollars ($100.00) of increase in the limit of the Towing Company's liability for demurrage specified in such notice, but in no event shall such liability exceed the actual legal liability of the Towing Company for such demurrage. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether by limitation of its liability under the Statutes of the United States or otherwise."

"16. When a self-propelled vessel under power is towed or pushed stern first by one tug at her bow or stern, or is being winded by one tug at her bow or stern, or when a tug or tugs are assisting any vessel in conjunction with a tug not owned or operated by the Towing Company, the liability of the Towing Company for damages arising out of the service shall not exceed One Thousand Dollars ($1,000.00). The amount may be increased by written notice to the Towing Company given by the owner, charterer, or person having control of the vessel or vessels to be served before the service is commenced, provided any rate as set forth in this tariff and as applicable to the service to be performed is increased in the amount of five per cent for every One Thousand Dollars ($1,000.00) that the Towing Company's liability is increased. Such amount shall constitute the total maximum liability of the Towing Company irrespective of the number of vessels served in the same service and irrespective of the number of claims asserted arising out of such service. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether on the merits or by limitation of its liability under Statutes of the United States or otherwise."

Immediately upon receipt of the tariff the chairman of respondent's Board of Directors wrote to petitioner protesting the efficacy of Article 16 and was in turn informed by petitioner's president that tug service would be rendered only in accordance with the terms of the tariff. Respondent replied on or about April 27, 1960 that it would avail itself

of tug service under protest and without prejudice to its right to challenge the tariff provision. No further change was made in the tariff and no further correspondence was exchanged between the parties between that date and the date of the accident.

Article 16 was first included in petitioner's tariff on April 15, 1956 and has continued in generally the same form in all of petitioner's tariffs to May 23, 1961.. No lake vessel or vessel owner ever availed itself of the increased liability provisions of Article 16 of the tariff. Article 11 was first included in petitioner's tariff on May 1, 1918 and was continued generally in the same form in all of petitioner's tariffs to May 23, 1961. No lake vessel or vessel owner ever availed itself of the increased liability provisions under Article 11 of the tariff during a period of 12 years prior to May 23, 1961. Respondent did not make any effort to avail itself of the increased liability provisions of Articles 11 or 16 in connection with the tow in question.

On May 23, 1961 the Steamer Detroit Edison arrived and docked port side to heading inland at the # 2 dock of the Inland Steel Company on the southeasterly side of the Indiana Harbor Canal at Indiana Harbor, Indiana. The canal is approximately 300 ft. in width and the berth of the Detroit Edison was approximately 1,100 feet southwest of the northerly end of the canal pierheads where the canal empties into the harbor basin. A large lake vessel and a smaller ocean type vessel were moored immediately astern of the Detroit Edison at the Inland Steel Company dock and a river barge was moored near the mouth of the canal on the opposite side at the Youngstown Sheet and Tube Company dock. The weather was favorable and in no wise was a factor in the ensuing events. The Detroit Edison discharged approximately one-half of her stone cargo so that there remained aboard her such cargo and water ballast as to give her a draft of 19 ft. 4 in. forward and

19 ft. 6 in. aft. The cargo remaining aboard the steamer was consigned to the Inland #4 dock which was 2,200 feet across the Indiana Harbor Basin from the mouth of the canal and approximately 3,300 feet from # 2 dock where the Detroit Edison then lay. Inland # 4 dock is a concrete dock. A line of wooden spile clusters are driven into the bottom of the harbor basin parallel with but approximately 30 feet out from the face of the concrete dock. The vessels using # 4 dock land against these spile clusters and tie up to them.

At about 6:30 p.m. on May 23, 1961, the first mate of the Steamer Detroit Edison called petitioner's Chicago tug office and requested the services of one tug to shift the steamer from Inland # 2 dock to Inland # 4 dock. About an hour later the Tug Montana, which had been lying in the vicinity of the outer end of the Indiana Harbor Canal, was dispatched to assist the Steamer Detroit Edison and sailed up the canal past the steamer, turned herself about and placed her starboard bow against the starboard bow of the steamer. The tug accepted the steamer's towline making it fast to the tug's forward towpost in such a manner that there was 60 to 75 feet of line between the stem of the steamer and the forward towpost on the bow of the tug. The vessels signaled to each other that they were ready to proceed. The masters of both vessels fully understood that the steamer was to move stern first down the canal and across the basin and was to turn and dock starboard side to at the # 4 dock of the Inland Steel Company. Both masters recognized that the operation would be a joint venture requiring their alert action and cooperation. During the course of the ensuing movement both vessels were manned by full crews of competent officers and men.

The steamer and the tug, working together, maneuvered the steamer to the center of the canal and in position to clear the vessels astern. Then, with the starboard bow of

the tug against the starboard bow of the steamer, the tug shoved the steamer astern, gathering momentum as the vessel moved stern first out the canal. The sternway of the Detroit Edison reached a maximum of 3 to 4 m.p.h. and she was moving at about such speed at a point two-thirds of the way across the basin, when the steamer's stern was approximately 600 feet away from the #4 dock. The tug initiated the movement astern of the steamer and provided such sternway as the steamer obtained.

As the steamer moved astern out the canal and when her bow cleared the piers at the mouth of the canal, the Tug Montana swung left into a position at a right angle to the length of the steamer with her starboard side at the steamer's bow so that she was working slowly across the steamer's bow with her towline leading at roughly a right angle off the steamer's starboard bow in order to start the steamer's bow swinging to the right. In this position the tug not only was working slowly off the steamer's starboard bow but also was dragging sideways behind the steamer. When the Detroit Edison's stern reached a point 600 feet away from the #4 dock and the vessel was still substantially in line with the canal but was starting to swing, her master, feeling that she was moving astern a little fast, without signal from or to the tug put the engines of the Detroit Edison slow ahead and ordered her rudder hard right. Her engines were worked slow speed ahead at 20 r.p.m. and her rudder was swung hard right to a 45 degree angle to starboard. Shortly thereafter when the stern of the steamer was 400 feet away from the #4 dock, the first mate, stationed on the steamer's fantail as stern lookout, began calling out distances over the loud speaking system to the steamer's pilot house. The first call from the first mate to the pilot house was that the ship was "400 feet off the stern from the pile clusters and coming back lively." On receiving this communication the master in the steam-

er's pilot house rang up half speed ahead on her engines, which were worked half speed ahead at 40 r.p.m. Approximately one or two minutes later the first mate on the steamer's stern reported to her pilot house that the stern had closed to within 300 feet and was not swinging sufficiently to clear the dock. The master then rang up full ahead on the steamer's engines which were worked full speed ahead at 60 r.p.m. The master then hollered out of the front window of the steamer's pilot house for someone on the steamer's bow to tell the tug to get the bow over and straighten her out, but the second mate, who was stationed on the steamer's bow as bow lookout but at that time had moved back along the starboard side of the pilot house to watch the crew prepare the boom swing cables for unloading, did not hear the captain's yell and did not relay his message to the tug so the captain had to go out on the steamer's starboard bridge wing and hollered down to the tug himself. The steamer's master both motioned and shouted to the tug watchman to have the tug pull the steamer's bow up to the right. This message was received by the tug watchman and transmitted to the tug's captain who was then working at a broad angle off the starboard bow of the Detroit Edison. The tug's engines were worked at full speed ahead with the towline at a right angle off the steamer's starboard bow. The master of the steamer returned to his pilot house and signaled the engine room for emergency full ahead engines. The steamer's engines were worked at emergency full ahead at better than 100 r.p.m. The first mate on the steamer's stern continued to call out distances of 200, 150, 72, 48, 36, 24 and 12 feet over the loud speaking system to the pilot house as the steamer's stern approached the #4 dock.

Despite the full ahead power of the Detroit Edison and an increased rate of swing to the right with decreasing sternway, the steamer continued to move astern until the

trailing edge of her rudder brushed against the fourth wood spile cluster from the west end of the #4 dock, causing substantial damage. Following contact between the rudder of the Detroit Edison and the spile cluster, the steamer came momentarily to a stop and her stern then swung to the left, cleared the clusters and continued to the left until the vessel came around parallel to the #4 dock. The steamer thereafter proceeded to land at the dock without further incident.

Other than the shout of the master of the steamer from her starboard bridge wing to the watchman aboard the tug at the time that the steamer's stern was somewhat less than 300 feet away from the #4 dock, there were no whistle signals, radio-telephone communications or verbal communications from the steamer to the tug from the time that the steamer left the #2 dock until after the time that the steamer's rudder came into contact with the spile cluster at the #4 dock. The master of the steamer never relayed to the tug or advised the tug of any of the communications which he received from the first mate acting as lookout on the steamer's stern. The master of the steamer never advised the tug in any respect as to the steamer's position, course and speed. Those aboard the tug were not even aware that the steamer had come into contact with the spile cluster until they were told about it by someone aboard the steamer sometime after it had occurred and just before the final docking of the steamer at #4 dock.

Respondent commenced this action by filing a libel in admiralty against petitioner in the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to Article III, Section 2 of the Constitution of the United States and 28 U. S. C., Section 1333, which provides that the "district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any

civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Following answer by petitioner and on motion of petitioner pursuant to 28 U. S. C., Section 1404(a), the case was transferred to the United States District Court for the Northern District of Indiana, Hammond Division, for trial.

After trial of the issues before the District Court, findings of fact, conclusions of law and a memorandum decision were entered holding the Tug Montana solely at fault and liable for damages arising out of the accident because she gave the steamer too much sternway, because she selected and initiated an unsafe course for the steamer across the basin on approach to the #4 dock and because she permitted the steamer's stern to come too close to the #4 dock before attempting to swing the vessel around for a landing, but also holding Articles 11 and 16 of petitioner's tariff to be valid and applicable. The court later reopened the evidence on respondent's motion and received further testimony and a stipulation of facts and thereafter amended its findings numbered 8 and 9 and filed an amendment to its memorandum decision reiterating its view that Articles 11 and 16 of petitioner's tariff were valid and binding. Final judgment was entered adjudging that the accident and damages sustained therefrom by respondent's Steamer Detroit Edison were solely the result of negligence and fault on the part of petitioner's Tug Montana but, on stipulation between the parties that the physical damage to the steamer exceeded the sum of $1,000.00 and that damages by way of demurrage to respondent exceeded the sum of $837.50 for 8.375 days of delay, limiting respondent's recovery to the total sum of $1,837.50 plus costs. Appeal and cross-appeal followed to the United States Court of Appeals for the Seventh Circuit. Following submission of briefs and after hearing oral arguments

from proctors for both parties, the Court of Appeals rendered its opinion and made and entered its judgment vacating the judgment of the District Court and remanding the case for proof of damages unlimited by Articles 11 and 16 of petitioner's tariff. Petition for rehearing was denied.

## ARGUMENT.

The decision of the United States Court of Appeals for the Seventh Circuit should be reviewed by this Court because it directly conflicts with two prior decisions of the United States Court of Appeals for the Sixth Circuit, specifically and admittedly extends the scope of a decision of this Court beyond its prescribed limits, decides a question of maritime law in conflict with decisions of this Court and decisions of other courts of appeals in both the field of maritime law and other fields of transportation and communication and fails to take into consideration the well established rules of maritime law as to lookout and the obligations which were placed thereby upon respondent's steamship in the cooperative and joint venture undertaken by and between the steamship and petitioner's tug.

### I.

### THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE AND DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AS TO THE VALIDITY OF THE DEMURRAGE LIMITATION PROVISION OF PETITIONER'S TARIFF.

As was set forth in the statement of facts previously, Article 11 of petitioner's tariff, the demurrage liability limitation, was first included in the tariff on May 1, 1918 and was continued generally in the same form in all of petitioner's tariffs to May 23, 1961. In its opinion the United States Court of Appeals for the Seventh Circuit reversed the District Court and held Article 11 to be in-

valid. This decision is in direct conflict with prior decisions of the United States Court of Appeals for the Sixth Circuit which specifically upheld the validity of Article 11 of petitioner's tariff. *Hand & Johnson Tug Boat Line* v. *Canada S. S. Lines*, 6th Cir. 1922, 281 Fed. 779; *Great Lakes Towing Company* v. *Bethlehem Transp. Corp.*, 6th Cir. 1933, 65 F. (2d) 543.

## II.

### THE DECISION OF THE COURT OF APPEALS IN THIS CASE ADMITTEDLY EXTENDS THE SCOPE OF DECISIONS OF THIS COURT BEYOND THEIR INTENDED AND PRESCRIBED LIMITS.

The decision of the Court of Appeals in this case is specifically based upon decisions of this Court in *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, 75 S. Ct. 629, 99 L. Ed. 911 (1955), and *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2d) 78 (1963).

For years there was conflict among the lower courts as to whether or not a tug could exempt itself by contract from all liability to a vessel in tow for the tug's own negligence. This conflict was based upon differences in interpretation of the decision of this Court in *The Syracuse*, 79 U. S. (12 Wall.) 167, 20 L. Ed. 382 (1871). The matter was settled when this Court rendered its decision in the *Bisso* case which held invalid a provision in a towage contract exempting the tower from all liability for its negligence. Careful reading of the majority decision in the *Bisso* case indicates that the rule against release-from-liability provisions in towage contracts established in that case is a rule against provisions providing for an exemption or release from *all* liability for negligent towage. There is no mention of any rule to prohibit *limitation* of liability for negligent towage in a towage contract, any rule against the

validity of demurrage limitation provisions or any rule against a tower's charging alternative rates based upon the risk involved in the service to be performed. In decisions rendered at the same time as that in the *Bisso* case, ***Boston Metals Co.*** v. *The S/S Winding Gulf*, 349 U. S. 122, 75 S. Ct. 649, 99 L. Ed. 933 (1955), and *United States* v. *Nielson*, 349 U. S. 129, 75 S. Ct. 654, 99 L. Ed. 939 (1955), this Court specifically continued to uphold the validity of pilotage release-from-liability clauses in towage contracts, although subjecting them to close scrutiny and strict construction.

In a later decision in *Southwestern Sugar & Molasses Co.* v. *River Term. Corp.*, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. (2d) 1334 (1959), this Court looked back and stated that, "In *Bisso* . . . this court held that a towboat owner might not, as a defense to a suit alleging loss due to negligent towage, rely on a contractual provision which purported to exempt the towboat *altogether* from liability for negligent injury to its tow" (Emphasis added). This Court went even further and stated that in the case of a towing tariff filed with the Interstate Commerce Commission, a clause purporting to exculpate a tug owner from *all* liability for his own negligence was not invalid as a matter of law but was subject to consideration and determination by the Interstate Commerce Commission, before court consideration, as to particular circumstances of the towing industry either favoring or disfavoring the validity of such a clause. In its most recent decision on the subject of such clauses, *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2d) 78 (1963), this Court again considered a release-from-liability, or *exculpatory*, clause but in that instance one whereby the tow specifically agreed with the tower to assume any damage claims urged by third parties as well as any claim urged by virtue of damage to the tow. In *Dixilyn* this Court again specifically limited its decision to "a contract which *exempts* the tower from

liability for its own negligence", commonly called an "*exculpatory clause*".

There is no decision holding that a tower cannot by contract *limit* its liability for its own negligence to a prescribed amount with provision for increase in the limit of its liability upon payment of increased rates for service proportioned to the risk assumed. There is no decision holding that a tower cannot charge alternative rates based upon the risk assumed for the service to be performed. By its own admission the Court of Appeals extended the reasoning of this court in *Bisso*, as reaffirmed in *Dixilyn*, to this case even though petitioner's tariff limits, rather than excludes, liability, stating as follows:

> "It is our opinion that the policy reasons underlying the *Bisso* decision—(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains, 349 U. S. at 91—and the commercial certainty called for by Justice Harlan in *Dixilyn* control our decision, even though the tariff provisions before us limit, rather than exclude, liability."

Extension by the Court of Appeals of the reasoning of the *Bisso* case to a limitation provision, or an alternative rate provision based upon risks assumed, in a towage contract is such a departure from that decision as to require this Court's review thereof.

## III.

**THE DECISION OF THE COURT OF APPEALS IN THIS CASE DECIDES A QUESTION OF MARITIME LAW IN CONFLICT WITH EXISTING DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS IN THE FIELD OF MARITIME LAW AND OTHER FIELDS OF TRANSPORTATION AND COMMUNICATION.**

The decision of the Court of Appeals in this case holds invalid two provisions in a towage contract between Petitioner and Respondent: Article 16 of petitioner's tariff which limits the liability of petitioner in a one tug, stern first or winding (turning) operation to $1,000.00 with provision for increases in the amount of the limitation in $1,000.00 increments upon payment of increased rates in 5% increments, and Article 11 which limits petitioner's liability for demurrage in any case to $100.00 per day with provision for increases in the limit upon payment of increased rates. Of course, Article 16 is applicable only when the customer elects to use but one tug in the operation. If the customer chooses to use two tugs, it is not applicable.

Courts have uniformly upheld provisions in transportation contracts which limit the carrier's liability to a fixed amount with an option to increase the limit of liability by payment of increased rates proportioned to the risk assumed. As long as they are not unfairly imposed, the charging of alternative rates based upon the risk assumed has been validated by this Court and other courts of appeals. In *Hart* v. *Pennsylvania R. Co.*, 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717 (1884), this Court clearly stated that a common carrier could not exempt itself from liability for its own negligence but squarely held that it could limit its liability by contract based upon valuation, provided the shipper could declare a higher valuation and pay an in-

creased rate therefor. Such also was the decision of this Court in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314 (1912).

In *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788 (1889), the doctrine of the *Hart* case was extended to water carriers and in so doing this the Court interpreted the *Hart* case as upholding a limitation clause based on valuation. In its decision this Court pointed out that while the rationale for prohibiting a carrier from *exempting* itself from liability for its own negligence was based upon the carrier's superior bargaining position, the rationale for permitting the carrier to *limit* its liability by contract based upon valuation, provided the shipper could declare a higher valuation and pay an increased rate therefor, was to place the carrier back on an equal bargaining position with the shipper, rather than in a poorer bargaining position because of the requirement that the carrier serve all customers requesting service equally and the rule prohibiting the carrier's *exempting* itself from liability for its own negligence. This was affirmed by this Court in *The Ansaldo San Giorgio I* v. *Reinstrom Bros. Co.*, 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016 (1935), and *Smith* v. *The Ferncliff*, 306 U. S. 444, 59 S. Ct. 615, 83 L. Ed. 862 (1939). In *Petition of Isbrandtsen Company*, 2nd Cir. 1953, 201 F. (2d) 281, the Court of Appeals for the Second Circuit considered a situation involving ten locomotives and tenders which were shipped by water carrier and subsequently lost at sea. The shipment was not subject to the Carriage of Goods by Sea Act, 46 U. S. C., Sec. 130 *et seq.*, but a clause in the marine bill of lading covering the shipment incorporated the Carriage of Goods by Sea Act by reference. The court held that by incorporating the Act in the bill of lading, the water carrier's liability per package or freight unit was limited to $500.00 as prescribed by the Act because, under the Act, the ship-

per could have avoided the limitation by declaring in writing the nature and higher value of the goods and paying extra freight thereon. The court found the provision incorporated into the contract between the parties to be binding even though the shipping cost alone was $10,000.00 per unit of locomotive and tender. The Court limited the carrier's total liability to $5,000.00, even though it had already collected $100,000.00 in freight.

As to air carriers, the lower courts have gone even further and have upheld exculpatory or release-from-liability provisions. *Lichten* v. *Eastern Airlines, Inc.*, 2nd Cir. 1951, 189 F. (2d) 939; *Vogelsang* v. *Delta Air Lines, Inc.*, 2nd Cir. 1962, 302 F. (2d) 709; *Twentieth Century Delivery Service* v. *St. Paul Fire and Marine Ins. Co.*, 9th Cir. 1957, 242 F. (2d) 292. Of course, in the case of air carriers there is strict control by the Civil Aeronautics Commission as to rates so that these decision would appear to be in line with that of this court in *Southwestern Sugar & Molasses Co.* v. *River Term. Corp.*, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. (2d) 1334 (1959), wherein it was held that even an exculpatory clause in a towing tariff filed with the Interstate Commerce Commission was not invalid as a matter of law but was subject to the consideration and determination of the regulatory agency.

In the case of telegraph companies, contracts for limited liability, or the charging of alternative rates for the sending of messages based upon the risk to be assumed by the telegraph company in case of loss due to its negligence, have long been upheld as valid. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921); *George N. Pierce Co.* v. *Wells Fargo & Co.*, 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576 (1915).

In *Midland S. S. Line, Inc.* v. *Tug Arkansas*, 6th Cir. 1956, 232 F. (2d) 81, the Court of Appeals for the Sixth

Circuit considered a situation wherein an attack was made upon the validity of a clause in petitioner's tariff invalidating claims in the event of failure to fulfill specific requirements as to giving notice of claim within 30 days of the date of injury and reasonable opportunity to examine damages before repairs. The court upheld the validity of the provision, even though it was more of an exculpatory clause than a limitation clause, stating as follows:

> ". . . We agree with the District Court that the provision is valid and enforceable. While a towboat owner may not validly contract against all liability for his own negligence" (citing the *Bisso* case) "common carriers may impose just and reasonable limitation upon their common-law liability not amounting to an exemption from the consequence of their own negligence."

It is to be noted that this decision in the Sixth Circuit was rendered after and in light of the *Bisso* case. The decision of the Court of Appeals for the Seventh Circuit in this case is certainly in conflict with the statement quoted above from the Sixth Circuit.

The Court of Appeals for the Seventh Circuit extends the reasoning of this Court in *Bisso* to petitioner in this case on the basis that "with its monopolistic position on the Great Lakes it has the 'power to drive hard bargains.'" That petitioner is a virtual monopoly as to some services in certain Great Lakes ports was long ago determined in *United States* v. *Great Lakes Towing Company*, N. D. Ohio 1914, 217 Fed. 656. However, pursuant to that decision, petitioner was permitted to continue in business as a matter of public policy for the good of shipping on the Great Lakes but subject to the terms and conditions of a continuing and permanent injunction. That injunction is set forth in full at pp. 36-41 of the appendix hereto. The Court of Appeals in this case has failed to recognize the

full impact of the 1914 anti-trust injunction which contains provisions specifically made similar to the original Interstate Commerce Act and which prohibits petitioner from refusing or neglecting to furnish service in accordance with any request therefor. The injunction contains prohibitions against many practices and assures that the rates charged for petitioner's services will be reasonable by prohibiting rate cuts from petitioner's regular schedule of tariff rates except to meet, but not go below, competition and by providing that in no event can rates be fixed below actual cost of service or cut more than 25% at any one time. Even though petitioner may presently be a *de facto* monopoly as to some types of service at certain ports on the Great Lakes, it has no franchise or exclusive right thereto. Competition may arise at any time and petitioner must constantly be cognizant of that fact and fix its rates accordingly. Petitioner is actually in the identical situation in which the Western Union Telegraph Company found itself in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921), wherein this Court upheld the charging of alternative rates based upon the risk assumed with limitation of liability for negligence thereto.

The decision of the Court of Appeals in this case is an unwarranted extension of the reasoning of this Court in *Bisso* and contrary to other decisions of this Court and decisions of other courts of appeals upholding limitation of liability provisions, or the charging of alternative rates based upon the risk assumed, in all other transportation fields, as well as in the field of water transportation. This Court made it very clear in the *Bisso* case that the rule prohibiting contractual exculpatory provisions was merely an extension to the towage business of a general rule used by the courts with reference to other fields. The Court specifically referred to the fields involving bailors and

bailees, employers and employees, and public service companies and their customers. In a footnote with regard to those references, the Court cited a lengthy annotation in 175 A. L. R. 8-157 dealing with the validity of a contractual provision by one other than a carrier or employer for exemption from liability, or indemnification for the consequences of one's own negligence. Throughout the annotation with reference to the various relationships covered, the validity of such exemption provisions is generally said to be upheld where the parties to the contract bargain on an equal footing. They are generally declared invalid as against public policy where the party, such as a public utility, etc., seeking to enforce the provision has bargained from a superior position. The annotation indicates that it is almost uniformly held in all fields that a *limitation provision*, containing an option as to the assumed risk based upon a rate differential, is valid and binding.

## IV.

**THE DECISION OF THE COURT OF APPEALS IN THIS CASE, AS WELL AS THE DECISION OF THE DISTRICT COURT, FAILED TO CONSIDER AND APPLY THE WELL ESTABLISHED RULES OF MARITIME LAW AS TO LOOKOUT AND THE OBLIGATIONS WHICH THEY PLACED UPON RESPONDENT'S STEAMSHIP IN THE COOPERATIVE AND JOINT VENTURE UNDERTAKEN BY AND BETWEEN THE STEAMSHIP AND PETITIONER'S TUG.**

Both of the lower courts in this case clearly failed to consider and apply the following well settled rules: the Steamer Detroit Edison, as a large vessel being assisted in a stern first movement alone by the Tug Montana at her bow, was charged with the duty of maintaining a lookout astern for both vessels, *The Senator D. C. Chase*, 2nd Cir. 1901, 108 Fed. 110, *Nassau Barge Corp.* v. *The Fred B. Dalzell*, 2nd Cir. 1950, 180 F. (2d) 560, *Farrell Lines* v.

*S. S. Birkenstein, et al.*, S. D. N. Y. 1962, 207 F. Supp. 500, *Canada Steamship Lines, Ltd.* v. *Great Lakes Towing Company*, N. D. Ohio 1932, 1932 A. M. C. 563; the Steamer Detroit Edison was charged with the duty of warning the Tug Montana of any danger astern, *The Virginia Ehrman* v. *Curtis*, 97 U. S. 309, 24 L. Ed. 890 (1878), *Reiss S. S. Co.* v. *Great Lakes Towing Co.*, 8th Cir. 1949, 177 F. (2d) 681, affirming, D. C. Minn. 1948, 79 F. Supp. 1, *American S. S. Co.* v. *Great Lakes Towing Co.*, N. D. Ohio 1947, 73 F. Supp. 359, affirmed, 6th Cir. 1948, 165 F. (2d) 368, cert. den., 333 U. S. 881, 68 S. Ct. 913, 92 L. Ed. 1156, *Canada Steamship Lines, Ltd.* v. *Great Lakes Towing Co.*, N. D. Ohio 1932, 1932 A. M. C. 563, *The Vale Royal*, D. C. Md. 1943, 51 F. Supp. 412, *The Coleraine*, E. D. N. Y. 1910, 179 Fed. 977; the Steamer Detroit Edison was charged with the duty of maintaining a bow lookout, *Reiss S. S. Co.* v. *Great Lakes Towing Co.*, 8th Cir. 1949, 177 F. (2d) 681, *American Steamship Co.* v. *Great Lakes Towing Co. and City of East Chicago, Indiana*, N. D. Ind. 1960, 1961 A. M. C. 391; one of the duties of the steamer's bow lookout, included in looking and keeping the steamer's pilot house advised, was to relay orders from the steamer's pilot house to the tug, *American Steamship Co.* v. *Great Lakes Towing Company and City of East Chicago, Indiana*, N. D. Ind. 1960, 1961 A. M. C. 391. The master of the Steamer Detroit Edison, up high in her pilot house with a clear view and understanding at all times of the steamer's position, course and speed as she moved astern and with full information from her stern lookout as to the position of the steamer's stern with reference to the Inland #4 dock which she was approaching, communicated none of the information in his possession and which was communicated to him by his stern lookout to the Tug Montana either by whistle signal, by radio-telephone or by verbal communication, except for the one time when the steamer's

stern was somewhat less than 300 ft. away from the #4 dock when he did go out on the steamer's starboard bridge wing and call down to the tug to pull the steamer's bow up to the right. The captain of the Detroit Edison started to work her engines slow ahead when her stern was 600 ft. from the Inland #4 dock because he felt that the steamer was moving astern too fast. The steamer's first mate started calling out distances over the steamer's loud speaking system to the pilot house when her stern was 400 ft. away from the #4 dock and continued to call distances to the pilot house all the way down to the point of collision. The captain of the steamer worked his engines half speed ahead at 400 ft., full speed ahead at 300 ft. and emergency full speed ahead after he called to the tug to pull to the right. None of this information as to the steamer's speed moving astern, the rate of her swing to come alongside the dock, the distances of her stern from the approaching #4 dock, use of the steamer's engines and any danger of a collision was transmitted from the steamer's pilot house to the tug, even though the captain of the steamer knew that the tug, down low in the water at the steamer's bow with the full 604 ft. length and 72 ft. breadth of the steamer blocking its view of anything astern of the steamer, was totally dependent upon the steamer for information as to her position course and speed and warning as to danger astern. The fact that a lookout is properly stationed on a vessel is of no consequence unless he performs his duty. The Steamer Detroit Edison, being charged with the duty of lookout astern for both vessels and the duty to warn of any impending danger astern, by her lack of communication of any information or warning to the tug at her bow clearly breached its duty of maintaining a lookout astern. It is undisputed that the one communication from the steamer to the tug, which was simply for the tug to pull the steamer's bow up to the right and nothing more, was

immediately complied with by the tug. The further fact that the third mate stationed on the steamer's bow as bow lookout was either out of position or devoting his attention to the preparation of the boom swing cables for unloading, or both, so that he failed to hear and relay to the tug the initial call of the steamer's captain, thereby forcing the captain to go out on the steamer's starboard bridge wing and call down to the tug himself, was clearly a failure of bow lookout on the part of the steamer. It resulted in delay of the one and only communication from the steamer to the tug and probable delay in finally working the steamer's engines emergency full ahead.

Under the rule of *The Pennsylvania* v. *Troop*, 86 U. S. (19 Wall.) 125, 22 L. Ed. 148, 151 (1874), the failure of both stern and bow lookout on the part of the steamer placed upon respondent the burden of proving not only that such failure might not have caused the resultant collision or probably did not cause it but that it *could not* have caused it. *Circle Line Sightseeing Yachts, Inc.* v. *The City of New York*, 2nd Cir. 1960, 283 F. (2d) 811; *Afran Transport Company* v. *M/T Bergechief*, 2nd Cir. 1960, 270 F. (2d) 469. The failure of lookout at both ends of the Steamer Detroit Edison raised a presumption of negligence on the part of the steamer and *The Pennsylvania* rule placed a heavy burden of proof upon respondent. Not only did respondent fail to sustain the unusually heavy burden of *The Pennsylvania* rule but it is difficult to understand how it can be said that the steamer even performed its share, or any share at all, in the cooperative and joint venture undertaken by the two vessels because respondent offered no proof at all to excuse itself. The trial court made no findings concerning the obligations of lookout at either end of the steamer, the actions and lack of action in regard thereto, and the almost complete failure on the part of the steamer to communicate with and warn the tug.

The Court of Appeals made no reference at all thereto. It is submitted that, regardless of the action or lack of action on the part of the Tug Montana during the course of the steamer's movement, there was a serious and substantial failure of lookout at both stern (via the steamer's pilot house) and bow on the part of the steamer by reason of the failure to communicate information to and warn the tug. This was at best a material lack of cooperation in the cooperative and joint venture and at worst such fault as required the steamer to prove not only that it might not have caused or that it probably did not cause but that it *could not have caused* the subsequent collision. In either case, no offsetting proof was offered and the steamer was causally negligent and should have been held at fault, either alone or in conjunction with the Tug Montana.

## CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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*Proctors for The Great Lakes Towing Company, Petitioner.*

Of Counsel:
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# APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Nos. 14350, 14351 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

AMERICAN STEAMSHIP COMPANY, *Libelant-Appellant (Cross-Appellee)*, v. THE GREAT LAKES TOWING COMPANY, *Respondent-Appellee (Cross-Appellant)*. } Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

May 22, 1964

Before HASTINGS, *Chief Judge*, CASTLE and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge*. The questions raised are whether the district court erred in deciding respondent tug company was solely liable for negligence in causing damages to libelant's steamer, the Detroit Edison, and whether the court erred in applying respondent's tariff to limit alleged damages of $91,044.20 to the sum of $1,837.50. We hold the decision on liability was not erroneous, but that the court erred in deciding respondent's pertinent tariff provisions were valid and in limiting recovery accordingly.

The tug Montana, on May 23, 1961, was engaged by libelant to tow the Detroit Edison from a berth in the

Indiana Harbor canal to Inland Steel Company's #4 dock in the Indiana Harbor Ba in. Detroit Edison's own engines, aided by the Montana, moved her to the center of the canal. The Montana alone initiated the Detroit Edison's movement astern, working her starboard bow. She was pushed astern from the canal into the basin. The problem then was to move her 2,200 feet across the basin to the dock opposite the mouth of the canal. This required a turning (winding) maneuver of 90 degrees so that the Detroit Edison would be landed in her new berth parallel to the dock. Although the weather was good, the maneuver failed, Detroit Edison's rudder hit a wooden spile cluster near the concrete dock and was damaged.

The conclusion of negligence was based on ultimate fact findings that the tug Montana, in furnishing the sole motor power for the movement, gave the Detroit Edison "too much sternway," selected and indicated an unsafe course across the basin for approach to the #4 dock, and permitted the stern of the Detroit Edison to come too close to the dock before attempting to move her parallel for a landing.

There was testimony from which the district court could reasonably infer that the Montana's captain, who had knowledge of the basin and had undertaken the admittedly cooperative movement with one tug, negligently failed to begin the winding maneuver in time; that this negligence created an emergency in which the steamer's master, until then relying on the seamanship of the Montana's captain, to avoid collision ordered the steamer's engines ahead in gradual acceleration and signalled the Montana to bring the steamer's "bow up"; and that the Montana's response was too late to complete the maneuver safely.

Cross-examination of both the master and captain developed some inconsistencies and contrarieties, but these presented credibility judgments for the district court and

not for us. There is substantial evidence to support the district court's findings and they are not clearly erroneous. We have considered the entire evidence and are not left with a definite and firm conviction that a mistake has been made. *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), *United States* v. *M/V Martin*, 313 F. 2d 851, 852 (7th Cir. 1963). The conclusion based on the findings is not erroneous.

Libelant contends that Articles 11 and 16[1] of respondent's tariff are invalid as contrary to public policy. Article 16 purports to limit respondent's liability for damages to $1,000 in cases of asternway movement by one tug, and Article 11 purports to limit respondent's liability for

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[1] The relevant tariff provisions are as follows:

"11. The rates for service named herein are made upon the express condition that no claim for delay of any vessel served (whether due to repairs of damage or other causes), for which the Towing Company may be legally liable, shall in any case exceed One Hundred Dollars ($100.00) per calendar day of such delay. Upon written notice from the owner, charterer, or person having control of the vessel or vessels to be served to the Towing Company before the service is commenced, the above mentioned limit of liability upon demurrage claims may be increased, in which event the regular tariff rates will be increased five per cent of such rates for every One Hundred Dollars ($100.00) of increase in the limit of the Towing Company's liability for demurrage specified in such notice, but in no event shall such liability exceed the actual legal liability of the Towing Company for such demurrage. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether by limitation of its liability under the Statutes of the United States or otherwise.

* * * * *

"16. When a self-propelled vessel under power is towed or pushed stern first by one tug at her bow or stern, or is being winded by one tug at her bow or stern, or when a tug or tugs are assisting any vessel in conjunction with a tug not owned or operated by the Towing Company, the liability of the Towing Company for damages arising out of the service shall not exceed One Thousand Dollars ($1,000.00). This amount may be increased by written notice to the Towing Company given by the owner, charterer, or person having control of the vessel or vessels to be served before the service is commenced, provided any rate as set forth in this tariff and as applicable to the service to be performed is increased in the amount of five per cent for every One Thousand Dollars ($1,000.00) that the Towing Company's liability is increased. Such amount shall constitute the total maximum liability of the Towing Company irrespective of the number of vessels served in the same service and irrespective of the number of claims asserted arising out of such service. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether on the merits or by limitation of its liability under Statutes of the United States or otherwise."

demurrage during repairs to $100 a day. Escalation provisions are provided in each article so that if the tow gives respondent prior notice and pays an additional fee respondent's liability will be increased—$1,000 of additional liability for damages and $100 of additional demurrage for each additional fee increment of five per cent.

The limitation in Article 16 appeared first in 1956, and since its promulgation no customer had ever availed itself of the escalation provisions; nor had any customer availed itself of the escalation provisions of Article 11. When the tariff was published, libelant took exception to Article 16, reserving its right to question the ultimate legal effect of the limitation. To avail itself of the escalation provisions related to the damages at issue in this case, even if they could be anticipated, libelant demonstrated that the tug charges for the tow would have been increased almost six times—to $1,798.03.[2]

In a number of recent admiralty cases the Supreme Court has laid down a strong policy against clauses attempting to release wrongdoers from the effects of their negligence. In *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (May 16, 1955), the Court held, on public policy grounds, that a towage company cannot release itself by contract from all liability for its negligence causing damage to its tow. The same day the Court in *Boston Metals Co.* v. *The Winding Gulf*, 349 U. S. 122, struck down a clause in a towage contract which provided the master and crew of the tug would be servants of the tow and not responsible for negligent towage. And in April, 1963, the Supreme Court, *per curiam*, "adhered to the rule laid down in *Bisso* and *Winding Gulf*" and invalidated an indemnification clause in a towing contract reached after arm's length bargaining.

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2 The charges for the operation in question were $304.75. By the terms of Article 16, if two tugs had been employed in the maneuver, at a cost of $609.50, the limitation in that article would not be effective.

*Dixilyn Drilling Co.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697.

It is true that in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411, 421 (1959), the Court stated:

> "We hold that the Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded a reasonable opportunity to obtain from the I. C. C., in an appropriate form of proceeding, a determination as to the particular circumstances of the tugboat industry which lend justification to this form of clause, if any there be, or which militate toward a rule wholly invalidating such provisions regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulation."

The Court refused "automatically to extend the rule of *Bisso*" to *Southwestern Sugar* because *Bisso* did not involve "a pervasive regulatory scheme." The tariff before us, as in *Bisso*, was not subject to regulation by public authority.[3] And Justice Harlan, who wrote the majority opinion in *Southwestern Sugar*, in a concurring opinion in the subsequent *Dixilyn* case stated that "the overriding certainty of law in the kind of commercial transaction involved, would not be promoted by" opening the *Bisso* rule to indeterminate exceptions, where, unlike *Southwestern Sugar*, no functions of a regulatory agency are involved.

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[3] Respondent, though not a common carrier, has been put substantially on that basis through an anti-trust decree. *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 (N. D. Ohio, 1914). It is not subject to the Interstate Commerce Commission, and its tariffs are under its own control subject only to the terms of the anti-trust decree.

[4] The court found:

"16. The contemplated maneuver under weather conditions and daylight prevailing at the time of this disaster was not an unusual tug maneuver and is and was frequently performed by one tug assisting a steamer on her bow."

[5] The court found:

"9. That the Great Lakes Towing Company has a virtual monopoly in the business of towing large bulk lake steamers for hire in all of the major United States port[s] of the Great Lakes except Green Bay-Manitowac and Bay City-Saginaw."

The district court in the case at bar thought that since Article 16 limited liability only "where there is asternway movement by one tug"—an "obviously * * * difficult and somewhat hazardous operation"—the limitation was not unreasonable "[u]nder such circumstances." That this holding is based on conclusions seemingly contrary to its findings[4] is immaterial, since it is our opinion that the Supreme Court's reversal of the court of appeals in *Dixilyn Drilling Co.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697 (1963), *reversing* 303 F. 2d 237 (5th Cir. 1962), has effectually repudiated the Court's statement in *Southwestern Sugar* that "peculiar hazards" may not be bound by *Bisso* but may call for "development of * * * a particularized rule to deal with particularized circumstances." 360 U. S. at 419-420.

It is our opinion that the policy reasons underlying the *Bisso* decision—"(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains," 349 U. S. at 91—and the commercial certainty called for by Justice Harlan in *Dixilyn* control our decision, even though the tariff provisions before us limit, rather than exclude, liability.

Respondent was the negligent wrongdoer liable for payment of libelant's damages; and with its monopolistic position in the Great Lakes[5] it has the "power to drive hard bargains." Articles 11 and 16 must fall. An additional reason for invalidating Article 16 would be that there is no commercial "certainty" as the escalation provision has little meaning where the owner cannot anticipate the measure of damages to its vessel, and make a judgment about higher valuations and rates accordingly.

We have considered the reasons advanced by respondent for upholding the validity of Articles 11 and 16 but find them unavailing.

The court did not err in deciding respondent's negligence was the sole cause of the damages. It did err, however, in deciding the tariff provisions in Articles 11 and 16 are valid. The judgment is vacated and the cause remanded for proof of damages unlimited by Articles 11 and 16 of respondent's tariff.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Chicago 10, Illinois.

Friday, May 22, 1964.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

AMERICAN STEAMSHIP COMPANY,
*Libelant-Appellant,*
*(Cross-Appellee),*

No. 14350-51 *vs.*

THE GREAT LAKES TOWING COMPANY,
*Respondent-Appellee,*
*(Cross-Appellant).*

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED, and that this cause be, and it is hereby REMANDED to the said District Court for proof of damages unlimited by Articles 11 and 16 of respondent's tariff, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs in these appeals be taxed in favor of libelant-appellant (cross-appellee) American Steamship Company.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Chicago, Illinois, 60610.

Wednesday, June 17, 1964.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

AMERICAN STEAMSHIP COMPANY,
*Libelant-Appellant;*
*(Cross-Appellee),*

No. 14350-51 *vs.*

THE GREAT LAKES TOWING COMPANY,
*Respondent-Appellee,*
*(Cross-Appellant).*

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Northern District of Ohio, Eastern Division.

No. 8003 Equity

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THE UNITED STATES OF AMERICA,
*Petitioner,*

*vs.*

THE GREAT LAKES TOWING COMPANY, *et al.*,
*Defendants.*

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## FINAL DECREE.

(Filed June 15, 1914.)

This case was heard, upon pleadings and proofs, before Circuit Judges of the Sixth Judicial Circuit, under the Expediting Act of Feburary 11, 1903, Chapter 544 (32 Stat. L., 823).

Upon consideration whereof, and being fully advised in the premises, the Court, on the issues joined, adjudges and decrees as follows:

1. That the defendant, The Great Lakes Towing Company, and the corporations controlled by it, to-wit: the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line and the Great Lakes Towing Company, Ltd., constitute and are a combination in restraint of trade and commerce between the several states of the (United States,) and between the states of the United States and Canada, in violation of the Act of Con-

gress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies" (Act July 2, 1890, Ch. 647, 26 Stat. L. 209).

2. That the defendants, the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and each of them, their officers, agents, directors, servants, employees and successors, are hereby restrained and enjoined from directly or indirectly carrying on the business of vessel towing, either alone or in connection with wrecking, boiler testing and bottom work (or any one or more of said three last named classes of business), upon the Great Lakes and their tributaries, except in strict compliance with each of the requirements of this decree and in strict observance of the several injunctions hereby imposed.

3. That the defendants, the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and each of them, their officers, agents, directors, servants, employees and successors, are hereby perpetually restrained and enjoined from making or entering into (any contract, agreement or arrangement) with any person, persons, partnership, corporation or concern, to monopolize any part of the trade and commerce among the several states or with foreign nations, in or with respect to the business of vessel towing, either alone or in connection with wrecking, boiler testing and bottom work, or any one or more of the three classes of business last named, upon the Great Lakes and their tributaries.

4. That the defendants, the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, and the Hand & Johnson Tug Line,

and each of them, their officers, agents, directors, servants, employees and successors, are hereby perpetually restrained and enjoined, subject only to the qualifications hereafter expressed herein, from (a) entering into any contract, agreement or arrangement with any person, persons, partnership, corporation or concern, for joint services or for the pooling of receipts, or for suppressing, controlling or interfering in any manner with freedom of competition in any port or ports on the Great Lakes, whether or not the defendants above named, or either of them, shall be engaged in business in such port or ports; (b) entering into any agreement, contract or understanding, direct or indirect, with any customer, new or old, for the exclusive furnishing of the whole or any part ofthe towing or any other service of such customer, except the single item of service then immediately to be performed, and either as respects but one port or place, to the end that the ultimate rate to each customer shall be absolutely the same for each like, contemporaneous item of service; (c) giving or agreeing to give to any customer any rate, concession, discount or rebate, except such as are given equally and without discrimination to all customers for the like service, regardless of whether or not such customers are stockholders in the towing company, and regardless of the amount or proportion of their custom furnished to the towing company, or whether custom is given in whole or in part either at all or at any one or more of the ports where the towing company does business, or whether the custom so given relates to but one class or to more than one class of business so done by the towing company, *viz.*, towing, wrecking, boiler testing and bottom work or for any other reason whatever—to the end that the ultimate rate to each customer shall be absolutely the same for each like or contemporaneous and similar item of service; (d) giving any preference or priority of service, in point of time, to any customer, except

as based upon the order in which application for such item of service is made; (e) refusing or neglecting to furnish service as speedily as practicable to any applicant therefor, except where refusal to render service to such applicant is justified by a good faith belief, communicated to the customer, that payment for such service will not promptly be made; (f) making or giving any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, transportation, or other business, in any respect whatsoever; or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, transportation or business, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; (g) engaging in so-called "rate-wars," or making competitive cuts from its regular schedule of tariff rates, relating to any kind of service furnished by the towing company, except that to meet (but only to meet, and not to go below), actual rates made by the competitor or competitors for the same kind and quality of service, the towing company may cut not exceeding twenty five per cent from its regular tariff rates; provided further, that such cut shall not reduce the rate below the actual cost of such service, nor shall it be made in any case under circumstances constituting in fact unfair or fraudulent competition; and in all cases where such cuts are made from regular tariff schedules a record of the facts and circumstances shall be kept and immediately furnished to the commissioner, if one shall be provided for; (h) entering into any contract, agreement or understanding whereby the person, partnership or corporation from whom or from which any tug, tugs, or other property are purchased from the towing company, or obtained under lease, charter or exchange, is forbidden to engage either in the towing business or in any other class of business in which the towing company

may be engaged at any place or to any extent whatever; (i) entering into any contract, agreement or understanding whereby the person, partnership or corporation to whom or to which any tug, tugs, or other property is sold by the towing company, or leased, chartered or exchanged, whereby any limitation is imposed as to the use which may be made of such tug, tugs, or other property, or as to the ports in which they shall be operated or kept.

5. The towing company shall from time to time publish and keep on file in its office for public inspection by any person desiring to see the same, printed tariffs showing the charges to be made for towing and for all other classes of service in which the towing company may engage, at each port in which the company regularly has tugs stationed or in which it performs towing or other service. The tariff shall plainly show all charges to be made for towing and for each other class of service, and a schedule shall be made for each port. The charges not only for towing, but for all classes of service, shall be based upon the various kinds and degrees of service, the size and business of ships, and the season in which the service is to be rendered. For this purpose proper and equitable classifications may be made; but always on the basis of equality between, and without discrimination among, the customers of the towing company, for any reason whatever.

6. Unless the towing company shall, by writing, file in this cause within thirty days from the filing and notice of this decree, or within such further time as may be given for the purpose, its consent and agreement to be bound by all the foregoing terms and conditions of this decree, the Court will immediately proceed to create a receivership of the physical properties of the towing company, with power to operate said properties and carry on the business of said towing company subject to such further orders as may be made in this cause.

The towing company is hereby restrained and enjoined, during the time limited for the filing of such consent and agreement, from ceasing or suspending, in whole or in part, its towing service or any service in which it is now engaged.

7. The appointment and selection of a receiver, as well as the determination of his powers and duties, and the directions to be given, are reserved until the expiration of the time given the towing company for the consent and agreement provided for in the sixth paragraph of this decree, as are also the terms and provisions of the plan of sale of the properties of the towing company under such receivership.

8. The bill of complaint herein is hereby dismissed as to the defendant, the Pittsburgh Steamship Company.

9. Jurisdiction of this cause is retained for the purpose of giving full effect to this decree, or taking such other action, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree, including provision for commissionership to aid in such enforcement.

10. Any party to this cause, or any one succeeding to the rights of said party, in whole or in part, may make application to the Court at any time for such further orders and directions as may be necessary or proper in relation to the carrying out of the provisions of this decree.

J. W. WARRINGTON,
*Circuit Judge,*

L. E. KNAPPEN,
*Circuit Judge,*

A. C. DENISON,
*Circuit Judge.*